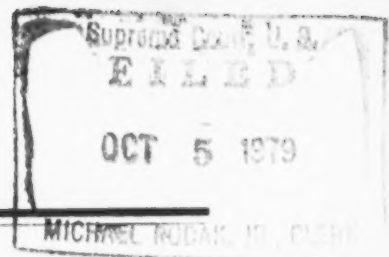


No. 79-417



In the
Supreme Court of the United States

OCTOBER TERM, 1979

FIRST NATIONAL BANK OF MONTEREY,
Petitioner,

v.

FIRST UNION BANK AND TRUST COMPANY OF
WINAMAC, INDIANA,
Respondent,

and

JOHN G. HEIMANN, COMPTROLLER OF THE
CURRENCY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Seventh Circuit, and Request
for Summary Reversal

**BRIEF OF RESPONDENT, FIRST UNION BANK
AND TRUST COMPANY OF WINAMAC, INDIANA,
IN OPPOSITION**

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The respondent, First Union Bank and Trust Company
of Winamac, Indiana, respectfully requests this Court to

deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed herein by the petitioner, First National Bank of Monterey, seeking a review of the latter court's opinion in this case. That opinion is reported at 600 F.2d 91.

RESPONDENT'S STATEMENT OF THE CASE

On August 18, 1976, the petitioner filed its application with the Comptroller of the Currency seeking approval for the location of a branch bank immediately north of Winamac, Indiana. The respondent opposed the application because the area in which the petitioner wished to construct its branch was not within a "city or town" separate from Winamac, as required by Indiana law, INDIANA CODE §28-1-17-1, and thus also as required by federal law, 12 U.S.C. §36(c) (1970).

The Comptroller nevertheless granted the application on June 2, 1977. Neither the Comptroller's decision nor the administrative record discussed the "town" issue raised by the respondent.

The respondent then filed its Complaint in the United States District Court for the Northern District of Indiana seeking a review of the Comptroller's decision. On September 16, 1977, the District Court granted the respondent's request for a preliminary injunction and remanded the case to the Comptroller. The case was remanded to the Comptroller for the reason that the administrative record did not contain any finding regarding the legality of the proposed branch bank site under Federal and Indiana law. Without that finding judicial review was effectively frustrated. On remand, the Comptroller accepted additional submissions by both parties on the "town"

question and thereafter concluded that the area in question was a "town".

The case was then returned to the District Court, whereupon the parties filed cross motions for summary judgment, and the District Court granted the motion of the petitioner and denied that of the respondent. In so ruling, the District Court, even though it acknowledge the existence of some doubt, elected not to disturb the Comptroller's administrative decision.

Thereafter, the respondent initiated its appeal to the United States Court of Appeals for the Seventh Circuit. Following briefing and oral argument, that Court of Appeals on June 15, 1979, reversed the District Court, holding that the record before the Comptroller contained no basis for his conclusion that the area in question had an identity separate from Winamac, that the record compelled the conclusion that placement of a branch there would subvert the purpose of the Indiana statute and that the term "town", as applied by the Comptroller, was "virtually meaningless". 600 F.2d at 99.

REASONS WHY THE PETITION SHOULD BE DENIED

1. **The Decisions of the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Eighth Circuit Do Not Conflict.**

Both the Eighth Circuit in *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371 (8th Cir. 1974) and the Seventh Circuit in the instant case, *First Union Bank and Trust Co. v. Heimann*, 600 F.2d 91 (7th Cir. 1979), recognized that the correct standard of review of a Comptroller of the Currency's decision is set forth in *Camp v. Pitts*, 411 U.S. 138 (1973). Both opinions recognize that the Comptroller's decision can be reversed only upon a showing that the Comptroller's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In *First Union*, the Seventh Circuit held as follows:

"We must determine whether the Comptroller's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. We must not set aside the Comptroller's determination if it has a rational basis in the record." 600 F.2d at 95 (citations and quotations omitted).

The above standard was the same standard as that applied by the *Fayetteville* court, in the following language:

"The District Court correctly acknowledged that its scope of review was limited, that it could not hold a *de novo* hearing, and finally that it could overturn the Comptroller's decision only if it found that decision to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 508 F.2d at 1373-74.

The petitioner attempts to create a conflict out of the Seventh Circuit's exclusion, from its discussion of the standard, all the descriptive language contained in the *Fayetteville* decision. A conflict is not, however, so easily created. A conflict between Circuits requires that there be a real and substantial difference between the Circuits and not one merely of form. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923).

The distinction feigned by the petitioner is one only of form. Both the Seventh and Eighth Circuits recognized *Camp v. Pitts*, 411 U.S. 138, 142 (1973) as controlling, and, thus, both imposed a substantial burden on the party seeking to overturn the Comptroller's decision.

Not only do both Circuits recognize the same standard of review, both also applied that standard to the administrative record before them. In both opinions, the Courts of Appeals recognized that their duty on appeal was to conduct a review of the administrative record to determine if that record rationally supported the Comptroller's decision. *First Union*, 600 F.2d at 95; *Fayetteville*, 508 F.2d at 1374. Furthermore, in *First Union*, as in *Fayetteville*, the Courts of Appeals closely scrutinized the administrative record for support for the Comptroller's decision. *First Union*, 600 F.2d at 97-98; *Fayetteville*, 508 F.2d 1376-78. Support was found in *Fayetteville*; it was absent in *First Union*. The important point is, however, that the same standard of review and the same application of that standard were used in both. No genuine conflict thus exists between the Circuits. The petition for writ of certiorari should therefore be denied. *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931).

2. The Seventh Circuit Recognized and Applied the Correct Standard.

As noted above, the Seventh Circuit recognized that the correct standard for its review of the Comptroller's actions was the arbitrary and capricious standard required by this Court's previous decisions. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971). Also, as noted above, the Seventh Circuit correctly conducted its review of the Comptroller's actions, in conformity with *Overton Park*, 401 U.S. at 415, by conducting a thorough, probing and in-depth review of the Comptroller's administrative record. See *First Union*, 600 F.2d at 94-95. Since the Seventh Circuit recognized and applied the correct standard of review, this Court need not, therefore, review the administrative record any further and may properly accept the Seventh Circuit's review thereof. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974).

3. The Decision Below Discusses No Issues of Public Importance.

The Seventh Circuit's decision resolved the issue of whether the area immediately north of the town of Winamac, Indiana, could be rationally found to be a town separate from Winamac under Indiana banking law. It reached no other issues.

The Seventh Circuit's decision is admittedly important to the petitioner. It is also, of course, important to the respondent. It may even be important, at some other time, to other Indiana banks. This case, however, contains no constitutional issue and it involves no genuine federal issue. Indeed, while this case involves an interesting state banking law question, it involves no matter

important outside the boundaries of the state of Indiana and, even within those boundaries, it will, at most, be important only to the Indiana banking industry.

Furthermore, the one banking law issue addressed is relevant only to a very narrow and limited portion of Indiana banking law. As such, this case is not of general public importance and does not call for this Court's grant of the petition for writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1954); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923).

The relatively narrow significance of this case is perhaps best demonstrated by the Comptroller's failure to petition this Court for a writ of certiorari. If there were involved herein any issue of substantial importance to the operation of the Comptroller's office or the National Banking System, the Comptroller most likely, on his own behalf, would have sought this Court's review. The Comptroller did not seek such review, thereby emphasizing the limited significance of this case.

The absence of an issue of general public importance is further reason for a denial of the petition for writ of certiorari.

4. The Seventh Circuit's Application of Indiana Law Was Correct.

As a general proposition, this Court does not review the decisions of a Circuit Court of Appeals on matters concerning the state law of the states within that Circuit for the reason that the Circuit Court is deemed to have expertise in the law of those states. *Helvering v. Stuart*, 317 U.S. 154, 163 (1942).

This Court's deference to the Seventh Circuit Court of Appeals in this case is especially appropriate since the Seventh Circuit not only is expert in Indiana law, but has correctly decided the state law question.

As already noted, the only question resolved by the Seventh Circuit was whether the area to the immediate north of the town of Winamac, Indiana, could be found to be a separate "town" under Indiana Banking Law. Since "town" is not defined in the relevant statute, INDIANA CODE §28-1-17-1, the "town" issue has arisen in the past and has prompted resolution by Indiana courts and by federal courts sitting in, or for, Indiana. *First National Bank of Crown Point v. Camp*, 342 F.2d 871 (N.D. Ind. 1971), *aff'd*, 463 F.2d 595 (7th Cir. 1972) (affirming Comptroller's finding of a town); *Pendleton Banking Co. v. Department of Financial Institutions*, 257 Ind. 363, 274 N.E.2d 705 (1971) (affirming Indiana Department of Financial Institution's finding of a town); *Albion National Bank v. Department of Financial Institutions*, 355 N.E.2d 873 (Ind. Ct. App. 1976) (reversing Indiana Department of Financial Institution's finding of a town). The *Pendleton* case established the basic principle, followed in the subsequent cases cited above, that a town is "a compact area having a number of persons living in close proximity to one another with some degree of business transacted within the area". 257 Ind. at 367-68, 274 N.E.2d at 708.

The Seventh Circuit, in the instant case, contrary to the representations of the petitioner, followed the *Pendleton* test:

"The Comptroller's opinion properly considers the three cases in which the definition of 'town' under the Indiana branch law is discussed, *First National Bank of Crown Point v. Camp*, 463 F.2d 595 (7th

Cir. 1972); *Pendleton Banking Co. v. Department of Financial Institutions*, 257 Ind. 363, 274 N.E.2d 705 (1971); and *Albion National Bank v. Department of Financial Institutions*, 355 N.E.2d 873 (Ind. App. 1976).

"In *Pendleton* the court described a town for purposes of the Indiana branch bank law as a compact area having a number of persons living in close proximity to one another with some degree of business being transacted within the area.

"This definition of the word 'town' was repeated by this court in *First National Bank of Crown Point v. Camp*, 463 F.2d 595, 597 n.4 (7th Cir. 1972)" 600 F.2d at 96

In addition to following the *Pendleton* precedent, the Seventh Circuit also followed the precedent established in *Albion National Bank v. Department of Financial Institutions*, 355 N.E.2d 873 (Ind. Ct. App. 1976). In *Albion*, the Indiana Court of Appeals held that not just any scattered assembly of buildings and residences will suffice to create a "town". Those buildings and residences must have some nexus to one another and be within a compact area. Based on *Albion* as well as *Pendleton*, the Court of Appeals held that the area to the north of Winamac could not rationally be found to be a "town".

The Comptroller attempted, and the petitioner is now attempting, to obtain judicial sanction for a sterile application of the *Pendleton* standard, which standard would ignore *Albion*, by asking that any area which contains "some" people and "some" business be deemed a "town". The Seventh Circuit correctly determined that the test could not be so applied since an area must at

least be recognized as some sort of a community and not merely a scattered assortment of buildings. The Seventh Circuit further correctly held that the Indiana General Assembly did not intend nor have the Indiana courts sanctioned an application of the "town" requirement which would permit an area, such as that involved in this case, to meet the test.

By requiring that the concept of "town" be given some meaning, the Seventh Circuit was acting in accordance with the intent of the Indiana General Assembly and with the construction given to the "town" requirement by the Indiana courts.

Therefore, since the decision of the United States Court of Appeals for the Seventh Circuit on the state law issue was correct, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons above stated the petition for writ of certiorari and the request for a summary reversal should be denied.

Respectfully submitted,

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